

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 3585(b) of Title 18, U.S.C., provides that a defendant shall be given credit toward the service of a term of imprisonment for any period he has spent in official detention before beginning his sentence. Credit is awarded if the detention is attributable to the offense of conviction or to any other offense for which the defendant was arrested after committing the offense of conviction, as long as the period of detention has not been credited against another sentence.

The question presented in this case is whether the computation of credit is to be made by the district court at the time of sentencing or by the Attorney General after the defendant begins to serve his federal sentence.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	1
Statement	2
Summary of argument	5
Argument:	
The Attorney General, not the sentencing court, is responsible for awarding credit against a sentence for a period in official detention	8
A. The 1984 amendment to the detention credit statute did not transfer authority to compute sentencing credit from the Attorney General to the district court	8
B. BOP is best equipped to assign sentencing credit in a manner consistent with the objectives of the Sentencing Reform Act	23
Conclusion	30
Appendix A	1a
Appendix B	3a
Appendix C	15a

TABLE OF AUTHORITIES

Cases:	
<i>Aldridge v. United States</i> , 405 F.2d 831 (9th Cir. 1969)	8
<i>Edmonds v. Compagnie Generale Transatlantique</i> , 443 U.S. 256 (1979)	20
<i>Kelly v. Wauconda Park Dist.</i> , 801 F.2d 269 (7th Cir. 1986), cert. denied, 480 U.S. 940 (1987)	17-18
<i>Klein v. Republic Steel Corp.</i> , 435 F.2d 762 (3d Cir. 1970)	17, 18
<i>Martin v. Luther</i> , 689 F.2d 109 (7th Cir. 1982)	19
<i>Massey v. People</i> , 736 P.2d 19 (Colo. 1987)	15

Cases—Continued:

	Page
<i>McElroy v. United States</i> , 455 U.S. 642 (1982)	17, 18
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	23
<i>O'Connor v. Attorney General</i> , 470 F.2d 732 (5th Cir. 1972)	26
<i>People v. Schuler</i> , 76 Cal. App. 3d 324, 142 Cal. Rptr. 798 (1977)	14-15
<i>Sea-Land Service, Inc. v. United States</i> , 874 F.2d 169 (3d Cir. 1989)	19
<i>United States v. Bayless</i> , 940 F.2d 300 (8th Cir. 1991)	10
<i>United States v. Benefield</i> , 942 F.2d 60 (1st Cir. 1991)	11, 15
<i>United States v. Beston</i> , 936 F.2d 361 (8th Cir. 1991)	11
<i>United States v. Brumbaugh</i> , 909 F.2d 289 (7th Cir. 1990)	12, 18, 21, 29
<i>United States v. Chalker</i> , 915 F.2d 1254 (9th Cir. 1990)	11
<i>United States v. Cook</i> , 890 F.2d 672 (4th Cir. 1989)	27, 28
<i>United States v. Dickerson</i> , 310 U.S. 554 (1940)	17
<i>United States v. Flanagan</i> , 868 F.2d 1544 (11th Cir. 1989)	10
<i>United States v. Lucas</i> , 898 F.2d 1554 (11th Cir. 1990)	4, 10, 12, 29
<i>United States v. Martinez</i> , 837 F.2d 861 (9th Cir. 1988)	10
<i>United States v. Mathis</i> , 689 F.2d 1364 (11th Cir. 1982)	29
<i>United States v. Morgan</i> , 425 F.2d 1388 (5th Cir. 1970)	10
<i>United States v. Richardson</i> , 901 F.2d 867 (10th Cir. 1990)	11
<i>United States v. Uccio</i> , 917 F.2d 80 (2d Cir. 1990)	28
<i>United States v. Woods</i> , 888 F.2d 653 (10th Cir. 1989), cert. denied, 494 U.S. 1006 (1990)	12
Statutes, regulations, and rules:	
Act of Sept. 2, 1960, Pub. L. No. 86-91, § 1(a), 74 Stat. 738	9
Hobbs Act, 18 U.S.C. 1951(a)	2

Statutes, regulations, and rules—Continued:

	Page
Sentencing Reform Act, 18 U.S.C. 3551 <i>et seq.</i> :	
18 U.S.C. 3582(a)	19
18 U.S.C. 3582(c)	19
18 U.S.C. 3582(d)	19
18 U.S.C. 3583(a)	19
18 U.S.C. 3583(c)-(g)	19
18 U.S.C. 3584(a)	19
18 U.S.C. 3584(b)	19
18 U.S.C. 3585	11, 19, 20, 21, 23, 24, 27, 28
18 U.S.C. 3585(a)	6, 13, 22
18 U.S.C. 3585(b)	<i>passim</i>
18 U.S.C. 3585(b)(1)	12
18 U.S.C. 3585(b)(2)	12
18 U.S.C. 3663	13
18 U.S.C. 3742	28
18 U.S.C. 3146	17
18 U.S.C. 3150 (1982)	17
18 U.S.C. 3568 (1982)	3, 8, 9, 10, 11, 13, 22, 23
18 U.S.C. 3575 (1982)	22
18 U.S.C. 3577 (1982)	22
18 U.S.C. 3579 (1982)	22
28 U.S.C. 2241	28
28 U.S.C. 2255	28
28 C.F.R.:	
Section 0.96	10
Section 542.10 <i>et seq.</i>	29
Fed. R. App. P. 4(b)	28
Fed. R. Crim. P.:	
Rule 35	27
Rule 35(a)	27
Miscellaneous:	
Federal Bureau of Prisons Operations Memorandum No. 157-90 (Oct. 10, 1990)	15
Federal Bureau of Prisons Operations Memorandum No. EMS OM 154-89 (Oct. 23, 1989)	11, 15, 23
Federal Prison System Program Statement No. 5880.24 (Sept. 5, 1979)	8, 9, 11, 23
H.R. Rep. No. 2058, 86th Cong., 2d Sess. (1960)	9
H.R. Rep. No. 1541, 89th Cong., 2d Sess. (1966)	9, 10
S. Rep. No. 750, 89th Cong., 1st Sess. (1965)	9
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	17, 20

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 916 F.2d 1115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1990. A petition for rehearing was denied on February 11, 1991. Pet. App. 9a. The petition for a writ of certiorari was filed on May 13, 1991 (a Monday), and was granted on October 7, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585(b) of Title 18, U.S.C., provides:

(b) Credit for Prior Custody.—A defendant shall be given credit toward the service of a term

of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

- (1) as a result of the offense for which the sentence was imposed; or
- (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

STATEMENT

1. In August 1988, respondent participated with two co-defendants in an abortive attempt to obtain money from the Bank of Putnam County in Cookeville, Tennessee, by making threats to the chief executive officer of the bank. Respondent and his co-defendants also threatened harm to the families of four high school students in an attempt to induce the students to help them carry out the scheme. Two of the students foiled the plot by reporting it to the authorities. Pet. App. 2a.

On October 5, 1988, respondent was arrested by state officials in connection with several robberies. On December 15, 1988, while respondent was in state custody, he was indicted in federal court for violating the Hobbs Act, 18 U.S.C. 1951(a), based on his involvement in the Bank of Putnam County incident, and an arrest warrant was issued. The next day, a federal detainer was filed against respondent with state prison authorities. Although the federal arrest warrant was signed and returned by the United States Marshal's Office on May 17, 1989, respondent remained in the custody of the Putnam County sheriff

pending disposition of the state charges against him. Pet. App. 2a-3a.

On November 29, 1989, respondent pleaded guilty to the federal charge and was sentenced on that charge to 8 years' imprisonment. At the time of sentencing, the district court orally denied respondent's request that he be given credit against his federal sentence for the time he served in state custody prior to the time his federal sentence was imposed. Pet. App. 3a. Shortly thereafter, in early December, respondent was sentenced on the state charges for which he had been detained. The state court imposed a total of 15 years' imprisonment on the state charges, and directed that the state sentence would be served concurrently with the federal sentence. See Gov't C.A. Br. Addendum A-C. The state court awarded respondent credit against his state sentence for the 429-day period he had been in state custody prior to sentencing, between October 5, 1988, and December 7, 1989. Gov't C.A. Br. Addendum C-1.¹

2. The court of appeals held that the district court should have granted respondent credit against his federal sentence for the period he spent in state custody. The court first held that under 18 U.S.C. 3585(b), unlike its immediate predecessor, 18 U.S.C. 3568 (1982), it is the district court, not the Attorney General, that must award credit for time spent in

¹ Respondent was sentenced for three separate state felonies to a 10-year term and a 5-year term of imprisonment, to run consecutively, and a 2-year term of imprisonment, to run concurrently with the 10-year term. The 2-year and 10-year terms were set to run concurrently with the 8-year federal term of imprisonment imposed in the instant case. See Gov't C.A. Br. Addendum A-C. The 429 days of credit for prior custody was awarded against respondent's 10-year sentence. Gov't C.A. Br. Addendum C-1.

official detention. The court acknowledged that its ruling on that point was at odds with the Eleventh Circuit's decision in *United States v. Lucas*, 898 F.2d 1554 (1990), in which the court held that the Attorney General has exclusive authority under Section 3585(b) to award credit against a federal sentence. Pet. App. 6a & n.2.

The court of appeals further held that a district court must give credit for a period of state detention as long as that period of detention "has not been credited to some other sentence, state or federal, *at the time sentence is imposed*." Pet. App. 8a (emphasis added). On remand from the court of appeals, in an Order dated March 29, 1991, the district court awarded respondent 13 months and 20 days of credit toward his federal sentence of 8 years for time served in state custody from October 8, 1988, to November 28, 1989.² See App., *infra*, 1a. As a consequence of that ruling, respondent in effect received double credit for the time he served in state detention.³

² Respondent was received into federal custody and began to serve his state and federal sentences on December 12, 1989. The district court awarded credit for the period in state custody only through the date of sentencing on November 28, because BOP had already awarded respondent credit for the period between the date that his federal sentence was imposed and the date that he arrived at the federal penitentiary, when his federal sentence officially began to run. During that period, respondent was in federal custody on a writ of habeas corpus ad prosequendum from state custody.

³ The fact that respondent is serving his state and federal sentences concurrently reduces the likelihood that the double credit for his detention time will result in a double reduction of his period of confinement. Nonetheless, he stands to benefit from the double credit by receiving an accelerated parole date from the state system, an accelerated final release date

SUMMARY OF ARGUMENT

Before 1987, defendants had a statutory right to credit for time spent in custody prior to sentencing under certain circumstances, and the statute granting that right assigned the task of calculating and awarding credit to the Attorney General. Under that regime, the court would impose sentence and the Bureau of Prisons would calculate the amount of credit due to the defendant for prior periods of custody relating to the offense. In 1984, Congress revised the custody credit provision, enlarging slightly the class of cases in which awards of credit for prior custody would be granted. The new version of the statute, 18 U.S.C. 3585(b), which became effective in November 1987, provided that the defendant "shall be given credit toward the service of a term of imprisonment for any time spent in official detention prior to the date the sentence commences." Unlike the prior version of the statute, however, Section 3585(b) did not indicate which entity—the Attorney General or the district court—would make the credit award.

and

from the state system, an accelerated release date from the federal system. Even if the service of his full federal sentence (less the credit for detention time) would render the acceleration of his state parole date less significant (since he would be "paroled" to the federal system, where he is already serving his federal sentence), he could still benefit from the double award of credit, if, for example, his state parole is revoked after his release from federal custody, and he is required to serve the remaining term of his state sentence (less the period of credit for detention time). And even if his parole is not revoked, his total period of parole on the state charges will be reduced by the detention credit awarded against the state sentence.

We agree with the Seventh, Tenth, and Eleventh Circuits that when Congress enacted Section 3585(b), it did not intend to shift responsibility for awarding presentence detention credit from the Attorney General to the courts. The language of Section 3585(b) supports that view in several respects. First, the statute refers to awarding credit for an offense "for which the sentence *was* imposed," which suggests that the award of credit was not intended to be part of the sentencing process. Second, detention credit was intended to include the entire period of custody "prior to the date the sentence commences." 18 U.S.C. 3585(b). Yet because a federal sentence commences only at the time the defendant is transported to or arrives at his designated detention facility, see 18 U.S.C. 3585(a), a sentencing court will often not be certain when the sentence will formally commence and thus not be in a position to calculate the precise amount of the presentence detention credit. Third, the statute's prohibition against "double counting," *i.e.*, giving credit for "jail time" that is credited to another sentence, would be undermined if the credit award were made part of the defendant's sentence, rather than being left for administrative determination. Because other jurisdictions may award the defendant "jail time" credit after the date of his federal sentence, the defendant would receive an unjustified windfall of double credit if his credit award had to be made by the court at the time of sentencing.

While it is true that Congress in 1984 omitted the reference to the Attorney General in the credit award statute, the omission does not indicate that Congress meant to make a change in the law in that respect. Congress did not replace the reference to the At-

torney General with a reference to the court, either explicit or implied. Nor is there any indication in any of the legislative materials that Congress intended to shift responsibility for making credit awards from the Attorney General to the district courts. A more plausible inference is that Congress regarded the Attorney General's role in awarding credit to be such a familiar and uncontroversial feature of the statutory procedure that it neglected to state explicitly that the Attorney General would continue to play the same role under the revised statute.

The practical difficulties that a court would face in making awards for presentence detention are such that if Congress intended to make the award part of the sentencing process, it is likely that it would have made the point explicitly in the new statute. One of the principal purposes of the Sentencing Reform Act of 1984 was to render criminal sentences more uniform by subjecting them to a nationwide system of guidelines. To shift responsibility for credit awards from the Attorney General, who applied a uniform set of guidelines for calculating and granting credit awards, to district courts, which would not have a broad national perspective nor be governed by a comprehensive regulatory scheme, would be likely to introduce inconsistencies in the way presentence credit is awarded. Moreover, because the calculation of credit awards turns on facts regarding proceedings in other jurisdictions that are not always readily available to a sentencing court, it is far more efficient to leave the task of calculating presentence credit to an administrative body. An administrative body like the Bureau of Prisons can gather facts through informal inquiry rather than formal proceedings, and it can promptly adjust credit awards when circumstances change, without the need for the initiation of

new judicial proceedings. And if the prisoner is not satisfied that the Attorney General has properly calculated his credit award, the prisoner may seek judicial review, as under the pre-1984 statute, after he has exhausted his administrative remedies within the Bureau of Prisons.

ARGUMENT

THE ATTORNEY GENERAL, NOT THE SENTENCING COURT, IS RESPONSIBLE FOR AWARDING CREDIT AGAINST A SENTENCE FOR A PERIOD IN OFFICIAL DETENTION

A. The 1984 Amendment To The Detention Credit Statute Did Not Transfer Authority To Compute Sentencing Credit From The Attorney General To The District Court

1. Prior to 1960, the question whether to grant credit for time spent in custody before sentencing was left to the sentencing court's discretion. The presumption was that, in imposing sentence, the sentencing judge would take the amount of time in custody into consideration. See Federal Prison System Program Statement No. 5880.24, at 1 (Sept. 5, 1979) [hereinafter *FPS Program Statement*] (reviewing the history of sentencing credit provisions and practice);⁴ *Aldridge v. United States*, 405 F.2d 831, 832 (9th Cir. 1969). Because judges considered themselves barred from reducing sentences below a mandatory minimum to take account of previous custody, Section 3568 was amended in 1960 to direct the Attorney General to grant credit for pretrial detention in cases in which prisoners were serving man-

datory minimum sentences. Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738; see H.R. Rep. No. 2058, 86th Cong., 2d Sess. 2 (1960). Judicial decisions later required the Attorney General to extend credit under that statute to defendants who received maximum statutory sentences, as it was clear that in those cases the sentencing court could not have granted credit for previous jail time in imposing sentence. See *FPS Program Statement* at 1, App., *infra*, 3a-4a.

2. In response to complaints that judges were often inconsistent in awarding credit for previous custody, Congress amended Section 3568 in 1966 to "guarantee[] credit for pretrial custody against service of sentences imposed upon conviction of any offense against the United States * * * without regard to whether the statute requires the imposition of a minimum mandatory sentence." S. Rep. No. 750, 89th Cong., 1st Sess. 21 (1965). In the interest of achieving greater uniformity in the determination of sentencing credit, Congress also decided to assign the task of granting credit exclusively to the Attorney General. As amended in 1966, Section 3568 provided that "[t]he Attorney General shall give [the defendant] credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed." See H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966) ("Upon imposition of sentence, the convicted defendant is turned over to the custody of the Attorney General and, therefore, from the administrative standpoint the Attorney General should be the individual who would give credit to the convicted defendant.").

Under the 1966 statute, the task of computing and assigning credit to federal prisoners for presentence

⁴ The FPS Program Statement is attached as an appendix to this brief.

periods of detention was assigned to the Bureau of Prisons (BOP), as the Attorney General's designee, see 28 C.F.R. 0.96. BOP made credit determinations for each prisoner according to uniform, nationwide guidelines. See *United States v. Lucas*, 898 F.2d 1554, 1556 (11th Cir. 1990). The computation process took place after the defendant was sentenced and transferred to the custody of the Attorney General; although BOP's credit award decision was subject to judicial review, the sentencing court had no direct role in making the computation and award of credit. See, e.g., *United States v. Bayless*, 940 F.2d 300, 304-305 (8th Cir. 1991) (under Section 3568, "the issue of whether [a prisoner] should be credited for the time that he spent in pre-sentence custody is, in the first instance, an issue for the Attorney General"); *United States v. Flanagan*, 868 F.2d 1544, 1546 (11th Cir. 1989) (prisoner's claim that his pre-sentence custody should have been credited against his sentence was not properly before the court because of failure to exhaust administrative remedies); *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988); *United States v. Morgan*, 425 F.2d 1388, 1389-1390 (5th Cir. 1970); see also H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966).

3. In the Sentencing Reform Act of 1984, Congress revised Section 3568 and recodified it as Section 3585(b). The amended version of the statute provided that "[a] defendant shall be given credit" toward his term of imprisonment for any period of "official detention" for which the defendant was arrested after committing the offense for which he was being sentenced.⁵ Unlike its predecessor, Section

3585(b) was silent regarding who was to make the credit determination. Pointing to the omission in Section 3585(b) of language referring to the Attorney General, the court of appeals in this case held that the new statute was meant to transfer to the sentencing court the responsibility for computing and awarding credit for presentence detention, even though the courts are nowhere mentioned in the statute.⁶ That

"official detention," and expressly limited the award of credit to time that "has not been credited against another sentence." In addition, the statute authorized credit not only for time served "in connection with the offense or acts for which sentence was imposed," see Section 3568, but also for any period of detention that was "a result of any other charge" for which the defendant was arrested after the commission of the offense for which the sentence was imposed. This language expanded the circumstances under which credit was available for prior state custody. Compare *FPS Program Statement*, at 1-5, App., *infra*, 4a, 6a, 8a-13a (credit under Section 3568 was granted only for non-federal custody "in connection with" the federal offense) with Federal Bureau of Prisons Operations Memorandum No. EMS OM 154-89 (Oct. 23, 1989) [hereinafter *October 1989 Operations Memorandum*] (credit for non-federal custody under Section 3585 is granted regardless of connection to federal offense). See also *United States v. Richardson*, 901 F.2d 867, 870 (10th Cir. 1990) (granting credit for prior state custody under Section 3585). The October 1989 Operations Memorandum is attached as an appendix to this brief. See App., *infra*, 15a-18a.

⁶ The First Circuit has taken the same position. See *United States v. Benefield*, 942 F.2d 60, 66-67 & n.7 (1991) (Section 3585 confers exclusive authority on the district court to assign sentencing credit). Two courts of appeals have held that the Attorney General and the district court have concurrent authority under that provision, see *United States v. Beston*, 936 F.2d 361, 363 (8th Cir. 1991); *United States v. Chalker*, 915 F.2d 1254, 1256-1258 (9th Cir. 1990), and three others have held that the Attorney General continues to exercise exclusive authority, as delegated to BOP, to assign sentencing credit

⁵ The new provision, which became effective in November 1987, replaced the term "custody" with the more precise term

holding is contrary to the language and purposes of Section 3585(b), which indicate that the credit determination is not to be made by the district court at sentencing, but by BOP at some point after the defendant begins to serve his sentence.

4. Section 3585(b) does not expressly assign the task of computing and awarding sentencing credit for previous detention. The statute thus fails to answer in express terms the question whether the Attorney General or the sentencing court is to exercise that function. Nonetheless, the statutory language provides strong indications that the Attorney General is to continue to make credit determinations and awards; it does not support the inference drawn by the court of appeals in this case—that Congress intended to relieve the Attorney General of authority to award credit for time served, and to transfer that authority to the courts. In particular, the statutory language that governs the timing of the credit award and the manner in which the amount of credit is to be calculated supports the view that Congress intended BOP—the agency to which the Attorney General has delegated this responsibility—to retain that authority.

a. Section 3585(b)(1) provides that defendants must be awarded credit for time spent in official detention as a result of the offense “for which the sentence *was imposed*” (emphasis added). Likewise, Section 3585(b)(2) mandates credit for time spent in official detention as a result of any other charge for which the defendant was arrested after the com-

under Section 3585. See *United States v. Brumbaugh*, 909 F.2d 289, 290-291 (7th Cir. 1990); *United States v. Lucas*, 898 F.2d at 1555-1556; *United States v. Woods*, 888 F.2d 653, 654 (10th Cir. 1989), cert. denied, 494 U.S. 1006 (1990).

mission of the offense “for which the sentence *was imposed*” (emphasis added). In this respect, Section 3585(b) is identical to its predecessor, Section 3568, which also required that credit be awarded in connection with the offense “for which sentence *was imposed*” (emphasis added). Under Section 3568, the time-served credit determination was made by BOP *after* sentencing. The use of the past tense in Section 3585(b) likewise indicates that the award of credit should be made *after*, rather than at the same time as, the imposition of sentence. Compare 18 U.S.C. 3663 (“the court, *when sentencing a defendant* * * *, may order * * * that the defendant make restitution”) (emphasis added). Thus, the statutory language governing the timing of the credit determination indicates that Congress intended to carry forward the pre-existing administrative practice, under which credit was granted by BOP when the defendant arrived at prison to serve his sentence, rather than by the courts at the time of sentencing.

b. Section 3585(b) also states that credit must be awarded for time spent in official detention “prior to the date the sentence commences.” Section 3585(a) provides that a sentence commences not on the date of sentencing, but “on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.” The district court often will be unable to determine at sentencing how much time the defendant will have served in official detention for which he is eligible to receive credit by the time he begins to serve his federal sentence.

The point is illustrated by this case, where a period of two weeks elapsed between respondent’s federal

sentencing and the date on which he began serving his state and federal sentences.⁷ BOP, by contrast, need not speculate about the amount of credit to which a defendant is entitled on the date he commences to serve his sentence. As the federal agency responsible for receiving new prisoners, BOP can make that calculation when the defendant begins serving his term. Since BOP, and not the district court, is in the position to carry out the statutory requirement that a defendant receive credit for time served up to the date he commences serving his sentence, it makes sense to read the statute to preserve BOP's role in making the credit determination.

c. The court of appeals' conclusion that district courts are authorized to award credit for post-offense detention under Section 3585(b) is also incompatible with the statute's explicit prohibition against "double counting"—that is, the award of credit for a period of detention that is credited against another sentence. As this case illustrates, a defendant may be eligible to receive credit for the same period of detention against both his state and federal sentences. If a district court imposes sentence before a defendant is sentenced on state charges, the court will not be in a position at sentencing to know what the state court will do. Thus, the federal court may end up shortening the defendant's sentence to take account of the same period of detention for which he subsequently receives credit from the State. This is more than a theoretical possibility, since many States either do not prohibit multiple credits at all or bar them only with respect to consecutive sentences. See, e.g., *People*

⁷ BOP awarded respondent credit for this period when he arrived at federal prison. See note 2, *infra*. Under the court of appeals' ruling in this case, BOP would lack authority to do so.

v. Schuler, 76 Cal. App. 3d 324, 330 & n.10, 142 Cal. Rptr. 798, 802 & n.10 (1977); *Massey v. People*, 736 P.2d 19, 21 (Colo. 1987).⁸ Moreover, even in States that expressly prohibit multiple credits for consecutive sentences, a state court that is unaware of a previous award of credit against a federal sentence may inadvertently make a duplicative award of credit.

The likelihood that double credit will be awarded as a result of granting detention credit as part of the sentencing process flies in the face of the statutory command that credit be given only for a period of detention "that has not been credited against another sentence." The court of appeals read the statutory ban on double counting as if it prohibited double counting only so long as the detention has not been

⁸ Although normally a grant of credit against a state sentence will result in the denial of credit against a federal sentence, BOP grants credit against a federal sentence when "the state orders [its] sentence to run concurrently with the federal sentence, and the state sentence will be absorbed [in the federal sentence] prior to grant of good time, resulting in no benefit from the state jail time." See *October 1989 Operations Memorandum*, at 2, App., *infra*, 17a-18a; see also Federal BOP Operations Memorandum No. 157-90 (Oct. 10, 1990) (extending effective date of October 1989 Operations Memorandum to October 31, 1991). The First Circuit has recently adopted a similar rule in construing Section 3585(b). See *United States v. Benefield*, 942 F.2d at 67 ("credit granted by the state court was rendered meaningless when not similarly reflected in [defendant's] concurrent federal sentence").

Although respondent's 10-year state sentence against which custody credit was awarded was made concurrent with the 8-year federal sentence at issue here, he would not be entitled to credit against his federal sentence under the BOP guidelines, because his total state sentence will not "be absorbed [in his federal sentence] prior to the grant of good time."

credited against another sentence "at the time federal sentence is imposed." Pet. App. 8a. The court was forced to adopt that proviso because the result of assigning responsibility for the credit decision to the sentencing court is that the same period of detention might count twice if, as in this case, credit is awarded against a state sentence after the federal sentence is imposed. The proviso added by the court of appeals, however, has no grounding whatever in the language of the statute, and there is no sound reason why some defendants should receive the windfall of double credit for a single period of detention simply because of a fortuity of timing.

The anomaly produced by the court of appeals' ruling can be avoided, and the double counting ban applied with consistency, if the award of credit is treated as an administrative task that is performed after the defendant begins to serve his federal sentence, allowing adjustments to be made during the service of the sentence. In the course of a defendant's service of his federal sentence, it will ordinarily become clear whether the defendant has received credit on other sentences for periods of detention that would bar a second award of credit under Section 3585(b). If the credit determination is an administrative task, rather than part of the sentencing function, the defendant's sentence can be modified during his period of incarceration to account for later awards of credit on other sentences imposed after the federal sentence. Here, if the court of appeals had held that the credit determination was for BOP to make, BOP could simply have noted the award of credit on respondent's state sentence and refused to credit the period of state detention against his federal sentence. But such adjustments cannot easily be made if the credit de-

termination is one for the sentencing court to make as part of the imposition of the federal sentence.

5. Respondent relies heavily on the canon of statutory construction holding that where "the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." Br. in Opp. 7, quoting *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-766 (3d Cir. 1970). He argues that under that principle the deletion of the reference to the Attorney General in Section 3585(b) necessarily reflects Congress's intent to withdraw the Attorney General's authority to make credit determinations, and to transfer that function to some other entity.

Contrary to respondent's suggestion, not every change Congress enacts alters the operation of a statute.⁹ As this Court has repeatedly stated, a change of statutory language is only "some evidence of a change of purpose." *McElroy v. United States*, 455 U.S. 642, 651 n.14 (1982). "[T]he inference of a change of intent is only 'a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence.'" *Ibid.*, quoting *United States v. Dickerson*, 310 U.S. 554, 561 (1940). See also *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 272 (7th Cir. 1986) ("Just because the language of a subsequent statute is not

⁹ For example, the current bail jumping statute, 18 U.S.C. 3146, requires that the defendant "knowingly" fail to appear. The previous bail jumping statute, former 18 U.S.C. 3150 (1982), required that the defendant "willfully" fail to appear. The Senate Report indicates that in making the change Congress "intend[ed] to perpetuate the concept of 'willfully' which appears in the current bail jumping statute." S. Rep. No. 225, 98th Cong., 1st Sess. 31 (1983).

identical to the earlier statute on which it was modeled, we do not necessarily assume that Congress intended to change the meaning") (citing *McElroy v. United States, supra*), cert. denied, 480 U.S. 940 (1987).

More fundamentally, canons of construction are only aids to guide the interpretive inquiry; they are not substitutes for careful analysis aimed at discerning Congress's intent. In the case of Section 3585(b), the rule of statutory construction invoked by respondent is especially unhelpful. When Congress deleted the reference to the Attorney General in Section 3585(b), it failed to replace the reference with another subject.¹⁰ By not designating another entity to exercise the sentence adjustment power, Congress left a textual gap. It thus falls to the judiciary to divine the meaning of this imperfect result of Congress's rather inelegant craftsmanship. See *United States v. Brumbaugh*, 909 F.2d at 291 ("The use of the passive voice in the statutory language requires [the courts] to infer a subject."). The Court must now determine whether Congress, in creating a gap in the statutory language, meant to bring about a very significant substantive change in prior procedures.

Where, as here, the amended statute says nothing about the matter in question, a change in statutory

¹⁰ In *Klein*, by contrast, the change introduced into the statute specifically addressed the key point at issue, which was whether the violation of a ban on dangerous mining practices required a showing of negligence. The revised statute added the words "in such a negligent manner" to the clause describing the forbidden conduct. To construe the statute as not requiring a showing of negligence would have flown in the face of the explicit terms of the statute. 435 F.2d at 765-766.

language "cannot be read in some sort of interpretive vacuum." *Martin v. Luther*, 689 F.2d 109, 117 (7th Cir. 1982). In the face of such ambiguity, and against the background of a longstanding and "consistently applied" practice under the statute, "a court should not infer a congressional intent to depart from precedent in the absence of some clear indication that it made a decision to do so." *Sea-Land Service, Inc. v. United States*, 874 F.2d 169, 172-173 (3d Cir. 1989). That indication is nowhere to be found in the text, structure, or background of the statute.

In light of the Attorney General's longstanding responsibility for calculating and awarding detention credit, it is unlikely that Congress would have shifted responsibility for awarding detention credit to the courts without doing so explicitly. Yet there is nothing in Section 3585 to indicate that Congress intended to change the entity responsible for sentencing credit; indeed, as explained above, the language of the statute points to the opposite conclusion. It is even less plausible to infer that Congress meant to transfer authority in this area to the courts in light of Congress's decision to make the district court's role in other sentencing matters plain by repeatedly including the phrase "the court shall" or "the court may" in statutory provisions closely related to the one at issue here. See 18 U.S.C. 3582(a), (c) and (d) (court's authority to impose a sentence of imprisonment); 18 U.S.C. 3583(a) and (c)-(g) (court's authority to impose term of supervised release following imprisonment); 18 U.S.C. 3584(a) and (b) (court's authority to impose concurrent or consecutive sentences). If Section 3585(b) was intended to depart from prior law by assigning to sentencing courts the responsibility for awarding credit, Congress surely

would have drafted it with the same specificity evident in those other sections.

The legislative history is likewise completely silent on what entity is to award credit for time served. The Senate Report summarizes the predecessor statute without so much as mentioning the delegation of authority to the Attorney General, and the discussion of Section 3585(b) does not even allude to the omission of an express delegation, let alone indicate any intention to shift responsibility to the district court. See S. Rep. No. 225, 98th Cong., 1st Sess. 128-129 (1983). As this Court has noted in a similar context, “[t]his silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely. * * * At the very least, one would expect some hint of a purpose to work such a change, but there [is] none.” *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). The omission of any reference to “working a change” in this context is even more telling in light of the comments in the Senate Report on each of the other substantive changes from the predecessor statute that were made in Section 3585.¹¹

¹¹ First, the Report discusses the difference between the two statutes regarding the date when sentence commences. S. Rep. No. 225, *supra*, at 129. Second, the Report points out that, while the predecessor statute authorized credit only for time spent in custody “in connection with the offense or acts for which the sentence was imposed,” *id.* at 128, Section 3585(b) also authorizes credit for time spent in custody as “a result of a separate charge for which [the defendant] was arrested after the commission of the current offense.” S. Rep. No. 225, *supra*, at 129. Finally, the Senate Report makes explicit reference to Section 3585(b)’s ban on double counting—a provision missing from the predecessor statute. Throughout its discussion of the entire Comprehensive Crime Control Act of 1984, the Senate Report is scrupulous in identifying

As the Seventh Circuit observed in *United States v. Brumbaugh*, 909 F.2d at 291, “[c]ertainly, if Congress had decided to make such a significant change in the allocation of responsibility in the sentencing function, the legislative history—comprehensive on so many other areas of criminal law reform—would reflect that policy choice.”

Given the unprecedented nature of shared jurisdiction in the area of sentencing credit, it is even more unlikely that Congress would have silently revised the statute to grant concurrent authority to the Attorney General and the sentencing court, as some courts of appeals have held (see note 6, *supra*). Yet neither the statute nor the legislative history contains even the remotest suggestion that Congress contemplated a system of shared responsibility or any hint as to how such a system would work. See pp. 24-25, *infra*. Indeed, since the court’s ~~exercise of~~ authority in a concurrent scheme would necessarily be exercised at the time of sentencing, concurrent jurisdiction is also inconsistent with the statutory language, discussed above, indicating that the credit determination is to be made at some point after the defendant has begun to serve his sentence. In the absence of any affirmative indication of an intent to reallocate authority in this manner, it must be concluded that Congress did not work a change in this aspect of the sentencing credit provision.

6. Respondent points to the placement of Section 3585 in Chapter 227 of Title 18, entitled “Sentences,” instead of in Chapter 229, entitled “Postsentence Administration.” See Br. in Opp. 7. He argues that if

the substantive changes, as opposed to merely stylistic ones, that the Act made in prior law.

Congress had intended to give the Attorney General authority to award credit after sentencing, it would have placed the provision in the latter chapter. *Ibid.*

The placement of Section 3585(b) in Chapter 227, rather than in the chapter entitled "Postsentence Administration," does not have the significance that respondent suggests. The predecessor of Section 3585(b), former Section 3568, which explicitly assigned responsibility for detention credit awards to the Attorney General, was not found in the chapter entitled "Postsentence Administration," but was located in a chapter entitled "Sentence, Judgment, and Execution," which also contained some provisions governing the imposition of sentence by the court. See 18 U.S.C. 3575 (1982) (sentencing of dangerous special offenders); 18 U.S.C. 3577 (1982) (use of information for sentencing); 18 U.S.C. 3579 (1982) (order of restitution at sentencing).

More significantly, Section 3585(a), which defines the commencement of the defendant's sentence, immediately precedes the subsection at issue in this case and is, of course, also found in Chapter 227. Yet Section 3585(a) is obviously directed to BOP, rather than the court, since it is BOP's task to calculate the inmate's release date, and it is therefore BOP that must take into account the starting date for the sentence. The location of Section 3585(b) in Chapter 227 therefore provides no support for respondent's contention that awarding credit for pre-trial detention is a judicial function, and in fact the grouping of Section 3585(b) with the administrative provision in Section 3585(a) suggests just the opposite.

B. BOP Is Best Equipped To Assign Sentencing Credit In A Manner Consistent With The Objectives Of The Sentencing Reform Act

1. In enacting the Sentencing Reform Act, of which Section 3585(b) is a part, Congress was concerned primarily with the "great variation among sentences imposed by different judges upon similarly situated offenders." *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Congress created the Sentencing Commission to devise a system of uniform sentencing guidelines that would bring greater regularity and uniformity to sentencing by "reducing sentencing disparities." *Id.* at 367.

In the case of detention credit awards, that objective was well served by the pre-existing statutory regime, under which BOP awarded and calculated credit for time served according to uniform national guidelines. As the administrative agency in charge of computing sentencing credit for 25 years, BOP developed a considered body of guidelines and procedures for administering the custody credit provisions. Those rules guaranteed a consistent approach nationwide to individual variations in defendants' situations that recur with some frequency. See *FPS Program Statement*, App., *infra*, 3a-14a (administrative guidelines promulgated under Section 3568); *October 1989 Operations Memorandum*, App., *infra*, 15a-18a (interim guidelines under Section 3585). For example, rules promulgated by the agency under Section 3568 addressed credit for time spent in a residential community center, on probation, on a writ of habeas corpus from non-federal custody, or in detention pending federal prosecution while simultaneously serving another sentence. App., *infra*, 6a-13a. Recent BOP guidelines also give guidance on the administration of the "double credit" bar in Section 3585, by

addressing cases in which, for example, the state sentence against which credit has already been awarded is vacated, state probation is granted, or the state charges are dismissed. App., *infra*, 17a.

If the task of computing sentencing credit is taken over by the courts, judges will be forced repeatedly to confront the range of circumstances that have already been addressed administratively by the agency with expertise in this area. In contrast with a system administered by BOP, one administered by the courts, which are not bound by BOP guidelines, inevitably will result in disparate credit awards for similarly situated defendants. To be sure, conflicts that develop among the district courts in awarding detention credit might gradually abate over time through the appellate process. Nevertheless, the process of judicial application of the statute on a case-by-case basis is likely to be far more cumbersome—and produce less uniformity in the end—than a system of administrative determinations governed by uniform rules and subject to subsequent judicial review.

Congress's principal reason for giving the Attorney General exclusive authority over sentencing credit in the 1966 statute was to eliminate the unfairness and disparities in credit awarded by courts at sentencing. There is no indication that Congress was dissatisfied with the system it created in 1966, or with BOP's handling of detention credit determinations under the predecessor statute. It is therefore hard to believe that, as part of legislation designed to bring regularity and uniformity to sentencing through the use of uniform guidelines, Congress abandoned a scheme that achieves that objective and resurrected an old regime that undermines it.

Interpreting Section 3585 to confer concurrent jurisdiction over sentencing credit to the courts and

BOP would also disserve Congress's objective of facilitating uniform and predictable sentencing procedures. The absence of statutory guidance on how a system of concurrent jurisdiction would work would inevitably lead to jurisdictional squabbles between the Executive and Judicial Branches, with the possibility of different resolutions of such questions in different jurisdictions. For example, once the district court awarded or declined to award credit, it is not clear whether BOP would have authority to alter the court's determination other than by making adjustments in the court's credit calculations based on factors occurring after sentencing. In any case, given the frequency with which postsentence adjustments would have to be made, the court's calculation of sentencing credit would only be tentative. It is difficult to fathom why Congress would choose to provide for two separate credit determinations—one preliminary and one final—with no clear indication of the discrete role each decisionmaking body should play.

2. BOP's administration of the sentencing credit function serves the goals of uniformity and fairness for other reasons as well: BOP is in a far better position than the courts to make a single, accurate calculation of the detention credit, to correct any errors in its determination, and to modify credit awards for changed circumstances.

a. An administrative agency with fact-finding authority and expertise in sentencing practice is far more likely than a sentencing judge to make an accurate and consistent calculation of the sentencing credit due a defendant. That calculation cannot be made without accurate information concerning the dates and precise circumstances of the prior detention for which the defendant seeks credit. BOP has the abil-

ity to communicate informally and directly with state and federal prison and law enforcement authorities to obtain and verify such information. In addition, eligibility for credit under Section 3585(b) depends on a number of other factors, including the circumstances of the previous presentence detention (*e.g.*, whether the defendant was serving another sentence at the time, and the type of facility in which he was detained), the timing of the arrest that resulted in the presentence custody, and whether, and under what circumstances, the same period of custody has been credited against another sentence. See, *e.g.*, App. B and C, *infra*.

BOP has developed and implemented established procedures for gathering the information necessary to make the credit determination. See *FPS Program Statement*, at 6, App., *infra*, 13a-14a (describing procedures for obtaining documentation “[w]hen there is cause to believe that credit may be due” or “any inconsistencies in the manner in which the factual situation presents itself”). A sentencing court, in contrast, has no independent fact-finding authority; it must depend on evidence the parties offer. In addition, unlike the agency—which can operate swiftly and informally—the court is restricted to fact-finding through formal proceedings. See, *e.g.*, *O'Connor v. Attorney General*, 470 F.2d 732, 734 (5th Cir. 1972) (noting that the requirement of exhaustion of “internal [BOP] administrative procedure[s]” is designed to “facilitate * * * proper credit being given to federal prisoners,” and that such determinations “present procedural difficulties” for courts because those “having knowledge of the facts surrounding state detention and the failure to make bail are usually far removed from the federal courts”).

b. BOP also has more flexibility to adjust a credit award for changed circumstances or errors in sentencing credit. And because BOP will be making credit determinations later in the process than the sentencing court, there will be fewer occasions on which the agency will be required to make modifications in the credit calculation in light of subsequent developments in other jurisdictions.

As discussed above, see pp. 13-14, the detention credit assigned by the district court at sentencing will fail to reflect post-sentencing events that determine the actual credit due under the statute, such as a subsequent award of credit against a state sentence for the same detention, the defendant’s continued detention during the interim before commencing his sentence, or the imposition of a new period of detention (*e.g.*, by revocation of bail pending appeal) before the defendant begins to serve his sentence. There is no ready mechanism for bringing defendants before the court to make post sentence adjustments, and Congress’s failure to provide one at the time it enacted Section 3585 is further evidence that it did not intend to transfer the sentencing credit function to the courts.

Prior to November 1, 1987, Fed. R. Crim. P. 35(a) authorized district courts to correct an illegal sentence at any time. But in the Sentencing Reform Act of 1984 (the same legislation that enacted Section 3585), Congress amended Rule 35 to authorize the district courts to revise a sentence only by correcting it on remand from the court of appeals, or on a government motion based on the defendant’s substantial assistance in an investigation or prosecution. See *United States v. Cook*, 890 F.2d 672, 674 (4th Cir. 1989). To be sure, it has been held that a district

court still retains inherent authority "to correct its own obvious errors in sentencing" within the 30 days allowed for a government appeal from a sentence under 18 U.S.C. 3742. See Fed. R. App. P. 4(b). See also *United States v. Uccio*, 917 F.2d 80, 84 (2d Cir. 1990); *Cook*, 890 F.2d at 675. But even assuming that exception would apply here, there would still be no way to correct the sentence when a second award of credit is made after the expiration of the 30-day period, which may sometimes happen. Nor does a defendant have any recourse when his post-sentencing detention extends beyond or begins after the thirtieth day following sentencing. Defendants (but not the government) can make a motion to correct their sentence under 28 U.S.C. 2255, or, in appropriate cases, to obtain release under 28 U.S.C. 2241. It is hard to believe, however, that, in enacting Section 3585, Congress intended federal prisoners to use the extraordinary remedy of habeas corpus to obtain interim sentencing credit, thereby flooding already overburdened federal courts with a large volume of routine requests for relief to which prisoners are statutorily entitled.

The same lack of adequate procedures that would render cumbersome any effort to modify the periods of credit awarded at sentencing would also present an obstacle to the correction of judicial credit awards that are based on errors of fact. Such errors could arise with some frequency, given the court's limited ability to verify key facts bearing on the amount of credit due. Parties could avail themselves of the limited opportunities for correcting the sentence in the sentencing court, or could utilize the cumbersome mechanism for appeal of sentences under 18 U.S.C. 3742. However, even these means of redress would be

available, at most, for only 30 days following sentencing.

In contrast, BOP retains unlimited flexibility, once the prisoner begins to serve his sentence, to modify the credit calculation to adjust to changing circumstances. In addition, in a system in which calculating credit is the responsibility of BOP, prisoners can always seek adjustment of their credit awards through the system of administrative appeals established by regulation, which incorporates strict deadlines insuring prompt resolution of such claims. See 28 C.F.R. 542.10 *et seq.* And if the defendant is dissatisfied with BOP's determination of credit, he may seek judicial review after exhausting his administrative remedies (as was the case under the 1966 statute). See *United States v. Brumbaugh*, 909 F.2d at 291; *United States v. Lucas*, 898 F.2d at 1555-1556; *United States v. Mathis*, 689 F.2d 1364, 1365 (11th Cir. 1982). A person in respondent's position therefore will not be denied an opportunity to have a court review his claim; that review will simply occur after BOP has first had the opportunity to assess the claim in light of the comprehensive guidelines for calculating sentencing credit that BOP has developed over the years.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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NOVEMBER 1991

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2:88-00016

Judge Morton

UNITED STATES OF AMERICA

v.

RICHARD WILSON

[Received Mar. 28, 1991]

[Entered Mar. 29, 1991]

ORDER

This matter is before the court upon remand from the United States Court of Appeals for the Sixth Circuit for resentencing and upon stipulation by the parties, as evidenced by the signatures below of counsel, that the defendant, Richard Wilson, is entitled to credit for time served from October 8, 1988 to November 28, 1989, for total credit of 13 months and 20 days, toward the sentence of 96 months imposed in this case.

(1a)

IT IS THEREFORE THE JUDGMENT OF THE COURT THAT the defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ninety-six (96) months and that he be given credit against the term of imprisonment for time in custody from October 8, 1988 to November 28, 1989, for total credit of 13 months and 20 days. The orders of the court with respect to supervised release and fine as entered in the Judgment on December 6, 1989, shall remain as previously ordered.

/s/ L. Clure Morton
 L. CLURE MORTON
 Senior U.S. District Judge

APPENDIX B

U.S. Department of Justice
 Federal Prison System

Washington, D.C. 20534

OPI	:	MISB
Number	:	5880.24
Date	:	September 5, 1979
Subject	:	Sentence Computation, Jail Time Credit Under 18 USC 3568

Program Statement

1. **PURPOSE.** To establish the procedures to be followed for making jail-time credit determinations.
2. **DIRECTIVES AFFECTED.** PS 5880.19, *Credit for Time in Custody Under 18 USC 3568*, (5-27-75), is superseded.
3. **BACKGROUND.** Prior to October 2, 1960, credit for time in custody before sentencing was left to the discretion of the sentencing court. The presumption was that the sentencing judge would take the amount of time spent in custody prior to sentencing into consideration at the time sentence was imposed. This first crediting statute (P. L. 86-691, an amendment to 18 USC 3568) granted credit on minimum-mandatory sentences. These were primarily the sentences imposed under the Harrison Narcotic Act of 1956.

Judicial decisions later extended jail credit for those sentenced to the maximum sentence for violation of

any statute, on the presumption that the sentencing court did not take the amount of jail time into consideration at the time of sentencing. As policy, this applied only to those sentenced after the effective date (October 2, 1960) of P. L. 86-691.

The passage of the Bail Reform Act of 1966 (P. L. 89-465) further expanded the credit to be given under 18 USC 3568 to all persons sentenced on and after the effective date of the Act (September 20, 1966). The language of the Act required credit for all time in custody in connection with the federal offense. Case law confirmed the application of the Act to YCA, FJDA, and NARA sentences. Courts also expanded federal jail credit to include periods of custody wherein the primary custody was with a non-federal agency. Credit was held to be applicable on any subsequent federal term of confinement because of the effect the federal charges (through a warrant or detainer) had on the non-federal custody.

4. *STATUTORY AUTHORITY.* Jail time credit is controlled by 18 USC 3568, which states "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or act for which sentence was imposed."

5. *POLICY.* "In custody" is defined, for purposes of this program statement, as *physical* incarceration in a jail-type institution or facility. It does not include all time that may be considered custody for habeas corpus jurisdiction purposes, for example in the case of *Hensley v. Municipal Court*, 411 U. S. 345 (1973) (See *Cochran v. U. S.*, 489 F.2d 691 (C.A. 5, 1974)).

Any part of a day spent in custody equals one day for credit purposes. Credit will be applied in the following manner for the following situations:

a. Sentences imposed prior to September 20, 1966.

Jail time credit will be applied 1.) to those sentences in which the maximum penalty was imposed, 2.) if the penalty of imprisonment added to the number of days in presentencing custody exceeds the maximum for the offense, or 3.) if the violation required the imposition of a minimum-mandatory penalty, and if the criteria in paragraph 5.b. are met.

(1) To determine if the maximum sentence was imposed, refer to the penalty provisions of the sections violated in the appropriate Title of the U. S. Code. If the sentence imposed represents the aggregation of terms on more than one count, jail time credit will be applied to the applicable count, prior to aggregating the terms.

(2) If a sentence is less than the maximum, but adding the sentence to the number of jail days exceeds the maximum for the offense, then jail time credit will be applicable for the number of days that caused the maximum for the offense to be exceeded.

(3) On a sentence imposed for an offense requiring the imposition of a minimum-mandatory penalty, the sentence imposed does not have to be the minimum-mandatory term. Any sentence imposed under the section requiring the minimum-mandatory penalty will be entitled to jail credit.

b. Sentences imposed on and after September 20, 1966.

- (1) Jail time credit will be given for time spent in the custody of the Attorney General (whether actual or constructive) as a direct result of the acts or offenses which resulted in the federal sentence. (See Paragraph 5.c. for the criteria for constructive federal custody.)
- (2) Jail time credit will not be given for any portion of time spent serving another sentence, either federal or non-federal, except that time spent serving a sentence that is vacated will be creditable toward another sentence if the later sentence is based on the same charges that led to the prior, vacated sentence. When failure to make bail due to indigency is a moot point, e.g., when another sentence is operative for the period of time in question, and any bail would not result in a change in custody status, then applying jail time would be giving double credit, i.e., credit on two separate and distinct sentences for the same period of time contrary to the intent of 18 USC 3568 to apply credit to sentences.
- (3) Time spent under a writ of habeas corpus from non-federal custody will not, in itself, be considered for the purpose of crediting jail time. The primary reason for custody in this case is not the federal charge. In this situation, it is considered that the federal court "borrowed" the prisoner under the provisions of the writ for purposes of

court appearance. This is secondary custody. Credit may infrequently be given under provisions of another paragraph.

- (4) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under P.L. 91-492 as a condition of parole (18 USC 4209) or probation (18 USC 3651) is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of probation is creditable as jail time because of the greater degree of restraint.
- (5) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under the provisions of 18 USC 3146 as a condition of bail or bond, including the "Pretrial Services" program (18 USC 3152-3154), is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. Also, a "highly restrictive" condition of bail or bond, such as requiring the defendant to report daily to the U. S. Marshal, is not considered as time

in custody. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint.

c. Constructive Federal Custody.

- (1) For time in non-federal custody when the non-federal custody is bases [sic] on charges that later resulted in a federal sentence:

(a) Credit will be given for all time spent in non-federal or foreign custody when the underlying basis for custody in fact is a federal warrant. For example, if a federal warrant is issued and the prisoner is arrested by county police or foreign officials on the basis of the federal warrant, credit will be given from the date of arrest to the date of sentence for all days in custody. Inquiries or requests for foreign jail time credit, along with copies of the judgment and commitment and BP-5, and copies of any documentation in the institution or in the possession of the inmate, must be sent to the central office Chief of Administrative Systems for verification and monitoring purposes.

(b) If the federal inmate has been in pre-sentence state custody on essentially the same charges, credit will also be given even though a federal detainer may not have been on file during that

time. Credit will be given for time spent in non-federal pre-sentence custody when the non-federal and federal charges are similar enough to be considered the same criminal act or offense. This is applicable when the factors of time, location, and the criminal acts are identical in both charges. Credit will also be given for all time spent serving a state sentence (on the same charges as defined in this paragraph) which is later vacated, set aside, or dismissed, in addition to any other non-federal presentence time. Following are some situation examples:

- 1 If a prisoner is arrested by county police on a state charge of armed robbery, and the prisoner is later convicted by the federal government of bank robbery, which bank robbery occurred during the same, identical act of armed robbery, credit will be given for all time spent in custody from the date of arrest to the date of the imposition of the first sentence (whether federal or non-federal).
- 2 If a prisoner is arrested by state police on a state charge of auto theft, and the prisoner is later convicted of a Dyer Act violation, involving theft of the same automobile in both state and federal charges, credit will be given for all time spent in custody from the date of arrest to the date

of imposition of the first sentence (whether federal or non-federal). Credit is applicable because the state auto theft was the same criminal act, at the same time and place as the Dyer Act violation.

- 3 If a prisoner is arrested by city police on a state charge of uttering a forged check and the prisoner is later convicted by the federal government for mail theft, the prisoner having obtained the check in question from the mails, credit will not be given. It is not the identical criminal act. Uttering requires a separate criminal act from theft of the check.
- 4 If a prisoner is arrested by county police on a state charge of armed robbery and the prisoner is later convicted by the federal government for possession of an unregistered firearm, which is the same firearm used in the robbery, credit will be given.
- 5 If a prisoner is arrested by county police on a state charge of uttering forged checks and the prisoner is later convicted of conspiracy to defraud the U.S. Government, the checks in question being U.S. Treasury checks used in the forgery, credit will *not* be given.

(2) For time in non-federal custody when the non-federal custody is based on charges

that are unrelated to the federal charges that resulted in a federal sentence:

- (a) Credit will be given on any subsequent federal term of imprisonment (to inviolator terms) when the state withdraws, increases, or refuses to set bail, solely due to the fact that a federal detainer is lodged, and the state fails to give jail time credit for that time. [C]redit will be given from the time the federal detainer is lodged up to the time the sentence is executed (either federal or non-federal). The state authorities must verify the fact that their bail status is due to the lodging of the federal detainer. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from state charges, there will be a presumption that the prisoner did receive credit for presentence time, however, this may be rebutted if the prisoner can dem-

onstrate that the state did not credit the time.

- (b) Credit will be given when a federal detainer is lodged, the prisoner does not make state bail based on a presumption of indigency, and the state fails to give jail credit for time. Credit will be given from the date the federal detainer was lodged up to the beginning date of either the federal or non-federal sentence, whichever occurs first. State bail must have been set. If the state charge was not bailable, no credit will apply to the federal sentence. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from the state charges, there will be a presumption that the prisoner did receive credit for presentence time, however, this may be rebutted if the prisoner can demonstrate that the state did not credit the time.

- (3) For time spent in custody of the Surgeon General as a civil commitment under Title I of NARA, credit will be given for all time in actual institutional confinement, if the later criminal sentence is a result of the same offense that led to the civil commitment. This is a specific provision of NARA, as codified under Title 28, U. S. Code, Section 2903(d).

6. **DOCUMENTATION.** Credit will be given only with proper documentation, indicating the prisoner was in custody within the application of paragraph 5. Proper documentation will consist of written documentation for the file from any law enforcement agency (including probation officers). This includes verified phone and teletype messages.

When there is cause to believe that credit may be due, arising from a request from the inmate or from other persons speaking in his behalf, or from any inconsistencies in the manner in which the factual situation presents itself, an effort to obtain the documentation necessary to make a determination will be made. Ordinarily this will consist of one communication (with written documentation that contact was made, either in the form of a carbon of the letter or teletype message, or by documenting the phone call) and one following communication if no response is received.

If the follow-up communication still produces no response, the matter should be referred to the Regional Office. No further action should be taken locally in that particular case until instruction is received from the Regional Office.

Sample letters of suggested types of communications to other agencies are in the attachments to his Program Statement.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director

APPENDIX C**OPERATIONS
MEMORANDUM**

Number: EMS OM 154-89 (5883)
Date: October 23, 1989
Subject: Credit for Time in Custody Under
18 USC 3585 (b)

CANCELLATION DATE: OCTOBER 31, 1990

I. PURPOSE: TO ADVISE STAFF OF THE PROCEDURES FOR THE CREDITING OF JAIL TIME UNDER TITLE 18, U.S. CODE, SECTION 3585(B).

II. DIRECTIVE REFERENCED:
PROGRAM STATEMENT 5880.24, SEPTEMBER 5, 1979, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568".

III. BACKGROUND: PRIOR TO NOVEMBER 1, 1987, JAIL TIME CREDIT, FOR TIME IN CUSTODY BEFORE SENTENCING, WAS CONTROLLED BY TITLE 18 USC, SECTION 3568. AS STATED UNDER THAT SECTION . . . "THE ATTORNEY GENERAL SHALL GIVE ANY SUCH PERSON CREDIT TOWARD SERVICE OF HIS SENTENCE FOR ANY DAYS SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH SENTENCE WAS IMPOSED". PROGRAM STATEMENT 5880.24, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568", ESTABLISHED THE PROCEDURES FOR MAKING JAIL TIME

CREDIT DETERMINATIONS. HOWEVER, WITH THE IMPLEMENTATION OF THE COMPREHENSIVE CRIME CONTROL ACT (CCCA) ON NOVEMBER 1, 1987, SECTION 3568 WAS REPEALED FOR OFFENSES COMMITTED ON OR AFTER THAT DATE. FOR OFFENSES COMMITTED PRIOR TO NOVEMBER 1, 1987, THE PROVISIONS OF SECTION 3568 AND PROGRAM STATEMENT 5880.24 REMAIN IN EFFECT.

IV. ACTION: THE FOLLOWING PROVISIONS OF TITLE 18, USC, SECTION 3585 (B), CONTROL THE CREDITING OF JAIL TIME CREDIT, FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987.

SECTION 3585 (B) CREDIT FOR PRIOR CUSTODY—

"A DEFENDANT SHALL BE GIVEN CREDIT TOWARD THE SERVICE OF A TERM OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL DETENTION PRIOR TO THE DATE THE SENTENCE COMMENCES—

- (1) AS A RESULT OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; OR
- (2) AS A RESULT OF ANY OTHER CHARGE FOR WHICH THE DEFENDANT WAS ARRESTED AFTER THE COMMISSION OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; THAT HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE."

UNDER SECTION 3585 (B), AN INMATE WILL RECEIVE JAIL TIME CREDIT ON THE FED-

ERAL SENTENCE, FOR TIME SPENT IN PRE-SENTENCE CUSTODY IN CONNECTION WITH THE FEDERAL OFFENSE; AND FOR ANY TIME SPENT IN PRE-SENTENCE CUSTODY AFTER THE DATE OF THE FEDERAL OFFENSE, IF CREDIT IS NOT AWARDED TOWARD SERVICE OF ANOTHER SENTENCE. FOR EXAMPLE, IF AN INMATE IS ARRESTED ON STATE CHARGES, AFTER THE DATE OF THE FEDERAL OFFENSE, AND IT IS DETERMINED THAT THE STATE DID NOT CREDIT THE PRE-SENTENCE CUSTODY TOWARD A STATE SENTENCE, THE TIME SPENT IN STATE PRE-TRIAL CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE, WILL BE CREDITED TOWARD THE FEDERAL SENTENCE.

IN THE FOLLOWING SITUATIONS, IT MAY ALSO BE DETERMINED THAT THE STATE HAS NOT AWARDED CREDIT TOWARD THE STATE SENTENCE IF:

- (1) THE STATE CHARGES ARE DISMISSED,
- (2) THE STATE SENTENCE IS VACATED WITH FURTHER PROSECUTION DEFERRED, THEREBY EFFECTIVELY VACATING THE STATE'S AWARD OF JAIL CREDIT,
- (3) STATE PROBATION IS GRANTED, OR
- (4) THE STATE ORDERS THEIR SENTENCE TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE, AND THE STATE SENTENCE WILL BE ABSORBED PRIOR TO GRANT OF GOOD TIME, RESULTING

IN NO BENEFIT FROM THE STATE JAIL TIME.

ORDINARILY, IF A SENTENCE RESULTS FROM STATE CHARGES, THERE WILL BE A PRESUMPTION THAT THE INMATE DID RECEIVE CREDIT FOR THE PRE-SENTENCE TIME. HOWEVER, IF IT CAN BE DEMONSTRATED THAT THE STATE DID NOT CREDIT THE TIME, THE PRE-SENTENCE CREDIT WILL BE AWARDED FOR TIME IN STATE CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE.

THESE PROCEDURES, UNDER SECTION 3585 (B), ONLY APPLY TO OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050).

CLAIR A. CRIPE
General Counsel